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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77 - 1391

GLORIA DELESDERNIER, wife of
PAUL MARCHAND
Petitioner

versus

ESTATE OF JULIA LOGA, wife of GEORGE W. DELESDERNIER, ET AL., and DELESDERNIER ESTATES, INC.
Respondents

REPLY BRIEF ON BEHALF OF MARK DELESDERNIER, RESPONDENT, TO PETITION FOR A WRIT OF CERTIORARI TO THE TWENTY-FIFTH JUDICIAL DISTRICT COURT PARISH OF PLAQUEMINES, STATE OF LOUISIANA

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Respondents

REPLY BRIEF ON BEHALF OF MARK DELESDERNIER, RESPONDENT, TO PETITION FOR A WRIT OF CERTIORARI TO THE TWENTY-FIFTH JUDICIAL DISTRICT COURT, PARISH OF PLAQUEMINES, STATE OF LOUISIANA

Petitioner, Gloria Delesdernier, wife of Paul Marchand, filed the present petition for a Writ of Certiorari from a judgment and opinion of the Court of Appeal of Louisiana, Fourth Circuit, of December 13, 1977. Re-hearing was denied on January 11, 1978, and a Writ of Certiorari to the Supreme Court of Louisiana was denied on February 17, 1978.

Petitioner contends that she has been deprived of property

without due process of law, as required by the Constitution of the United States, Amendment XIV, §1.

THIS CASE WAS PROPERLY FIXED FOR HEARING BY THE DISTRICT COURT ON EXCEPTIONS AND PROPERLY HEARD

Petitioner complains that the Exceptions (motions to dismiss) filed in these proceedings were not fixed for hearing and were never heard by the District Court.

Actually, there were two hearings on the Exceptions, one on May 11, 1976, and the other on July 9, 1976. At each of these hearings, the Exceptions in this case were heard, together with Exceptions filed in a companion suit entitled "Gloria Delesdernier, wife of Paul Marchand, vs. George T. Armstrong and Mark Delesdernier, et al," District Court No. 5699 and Louisiana Court of Appeal No. 8664.[1]

This is obvious from a review of a transcript of the hearing in the record of proceedings No. 8664.

For instance, the following discussion occurred at the May 11, 1976 hearing:

"MR. CARRERE:

> May it please the Court, I will address myself to Your Honor and Counsel as well, we are in this case that Mr. Snyder is arguing presently, but we also have the other cases which is (sic) up for argument today, forty six sixty five,

1. La. App. 354 So.2d 581 (1977).

> three thousand and five and ten forty three. I will suggest to the Court that these offers be incorporated into the record in regard to the other cases, subject to the same objection that Counsel has made herein. R. 389 (18).

"MR. McCALEB:

I would have no objections to that, Your Honor.

"MR. SNYDER:

I have no objections, Your Honor.

"THE COURT:

> In other words, these three documents that have been introduced as Armstrong 1, 2 and 3, will be made a part of -- Do you want to mark these differently in your suit? R. 389 (19).

"MR. CARRERE:

> Yes, Your Honor. We will mark them the same number and we will mark them, Mark 1, Mark 2 and Mark 3 in those other cases, Your Honor.

"THE COURT:

All right.

"MR. CARRERE:

We offer, file and introduce those into evidence, Your honor.

"THE COURT:

> All right. Subject to the objection, let the documents be filed and introduced into the record in the other three cases."

(Transcript of May 11, 1976 hearing.) R. 389 (20)

At the July 9, 1976 hearing, Mr. Snyder, Attorney for Mr. Armstrong, made the following statements:

> ". . . Also pending before this Court are consolidated proceedings which we have referred to as, 'The Family Cases.' "

(Transcript of July 9, 1976 hearing.) R. 470(9)

* * *

> ". . . So, those exceptions or those causes that are still in the family suit, subject to the pending exceptions, that were filed by Mr. Carrere were heard previously."

(Transcript of July 9, 1976 hearing.) R. 470(36)

The attorney for Mark Delesdernier made the following statements at the July 9, 1976 hearing:

"MR. CARRERE:

> It may not be appropriate at this moment, Your Honor, but rather than take up the Court's time, when the Court will finally hear me, we would adopt the argument of Mr. Snyder, both in the Armstrong suit and the family suit and certainly, this argument is totally appropriate to us in the Armstrong suit."

(Transcript of July 9, 1976 hearing.) R. 470(63)

It should be noted that the May 11 hearing was restricted to the issue of simulation, a doctrine which will be discussed hereafter.

Mr. McCaleb, attorney for petitioner, was present and active in argument at both hearings.

The issues in this case and in the Armstrong suit are basically identical. It was logical for the Court to set them for argument at the same time. In fact, it would be virtually impossible to reach a different decision in each case as to the issue of simulation. The properties are identical.

Petitioner, in brief and in argument before the Louisiana Court of Appeals, Fourth Circuit, and in Application for Writ to the Supreme Court of Louisiana, took the same position that she was deprived of proper notice and hearing.

The decision of the Court of Appeal was unanimous and the Supreme Court denied Writs, with every Justice joining in.

The cases cited by petitioner are not in point. They held:

A person, whose property is seized, must receive notice and must be given a judicial determination of the facts.[2]

A citizen cannot be branded as treasonable and a communist without notice or hearing.[3]

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2. Cox v. Armor Fertilizer Works, 237 U.S. 413, 35 Sup. Ct. 625, 59 L.Ed. 1027 (1915).

3. Joint Anti-Fascit Refugee Comm. v. McGrath, 341 U.S. 123, 71 Sup. Ct. 624, 95 L.Ed. 817 (1951).

A license and automobile registration may not be taken away from a driver without notice and an opportunity for a hearing before a proper forum.[4]

A welfare recipient may not have benefits terminated without notice and a factual determination.[5]

Perry, a Junior College Professor, was entitled to a hearing before being fired and must be given notice of the grounds for his non-retention, in light of his allegations that the practice of the institution established a de facto tenure program.[6]

Finally, tenants could not be evicted, as being undesirable, from the New York City Housing Authority facilities on factual findings which were not made after notice and hearing being afforded to such tenants.

Respondent takes no issue with said decisions. Certainly, the defendants were entitled to notice and hearing.[7,8]

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4. Bell v. Burson, 402 U.S. 535, 91 Sup. Ct. 1586, 29 L.Ed. 2d. 90 (1971).

5. Goldberg v. Kelly, 397 U.S. 254, 90 Sup. Ct. 1011, 25 L.Ed. 2d. 287 (1970).

6. Perry v. Sendermann, 408 U.S. 593, 92 Sup.Ct. 2694, 33 L.Ed.2d. 570 (1972).

7. Escalera v. N.Y. City Housing Authority, 425 F.2d. 853, CCA2 (1970), cert.den. 400 U.S. 853 (1970).

8. Hanley v. Four Corners Vacation Properties, Inc., et al, 480 F.2d 536, CCA 10 (1973).
This case is not appropriate. It held:

Plaintiffs cannot re-litigate in Federal Court when they have had their day in State Court.

In the instant case, petitioner instituted the suit as plaintiff. She has litigated it through the Louisiana Courts on two occasions, beginning prior to 1966. She has taken innumerable depositions, and she was afforded and took advantage of two opportunities to be heard on May 11, 1976, and July 9, 1976. Thereafter, the District Court rendered its decision.

NO FEDERAL QUESTION IS PRESENTED UNDER PROVISIONS OF 28 U.S.C. §1257(3)

Plaintiff, petitioner herein, instituted this suit under Louisiana law and procedure.

This State does not permit notice pleading (as used in the Federal Courts), and, as required, plaintiff alleged all facts relied on by her to state a cause of action upon which relief could be granted.

As stated, defendant filed an Exception of No Cause of Action, which the District Court maintained.[9]

With reference to the Exception of No Cause of Action, the Court of Appeal, by unanimous decision, held:[10]

> "it is well settled that in determining the validity of an exception of no cause of action, the allegations of the petition are accepted as true and evidence is inadmissible to disprove the allegations. See Babineaux v. Pernie-Bailey Drilling Co.,261 La.

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9. See Appendix A-1 of Petitioner's Brief.

10. La. App., 354 So.2d 576 (Dec. 13, 1977). Re-hearing denied Jan. 11, 1978, Certiorari denied Feb. 17, 1978, Supreme Court of Louisiana.

> 1080, 262 So.2d. 328 (1972); American Creosote Company v. Springer, 257 La. 116, 241 So. 2d. 510 (1970); LSA-C.C.P. art. 931. Where exhibits are made a part of the petition, they are considered in connection with the allegations. Leidenheimer v. Schutten, 194 La. 598, 194 So. 32 (1940); American Creosote Company v. Springer, supra. The issue on the exception of no cause of action is whether the petition and attached exhibits present a case legally entitling plaintiff to the redress sought. Hero Lands Company v. Texaco, Inc., 310 So.2d. 93 (La. 1975)."

Thereafter, the Court of Appeal held that plaintiff failed to state a cause of action in simulation with regard to certain alleged sales.

In Louisiana, a simulation is a fraudulent transfer by a parent during his lifetime to deprive his child or children of their ultimate legal inheritance from him in favor of another child or children. The parent in this case was George W. Delesdernier, plaintiff's grandfather.

The acts of sale in question obviously involve transfers of property from the White Succession (Estate) directly to the children, Mark, George O. and Shirley, of the Delesdernier family, and are not instruments conveying property owned by the Father to the children. The holding was based on the well established decisions in *Eberle v. Eberle*, 161 La. 313, 108 So. 549 (1926), and *Succession of Hogh*, 193 La. 260, 190 So. 399.

In reaching this decision, the Court held:

> "When we consider the allegations of the petition and the acts of sale incorporated by reference in the pleadings,[1] we are led to conclude that plaintiff fails to state a cause of action in simulation with regard to these sales. The petition, referring to the acts of sale from the White Succession to the children, merely alleges that George W. purportedly acted as agent on behalf of the children, but in fact purchased for himself because no agency existed. It is neither alleged nor contended that the property was conveyed by George W. to the children. George W. did not purchase as owner. In truth and in fact the purchase was made from the White succession by George W. as agent for the children. George W. appears only as agent. The acts of sale following the adjudication of the property to George W. recite that in confirmation of the adjudication the administrator of the succession conveys the property to the children 'represented by George W. Delesdernier'. The acts of sale on their face involve transfers of property from the White succession to the children, they are not instruments conveying property owned by George W. to the children. As pointed out by

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"1 The five acts of sale are:

1. Sale of Property by Succession of Robert M. White to Mark Delesdernier, represented by George W. Delesdernier, dated August 24, 1931.
2. Sale of Property by Succession of Robert M. White to Mark, George O. and Shirley I. Delesdernier, represented by George W. Delesdernier, dated October 29, 1931.
3. Sale of Property by Succession of Robert M. White to Mark, George O. and Shirley I. Delesdernier, represented by George W. Delesdernier, dated November 14, 1931.
4. and 5. Two 1931 tax sales of Robert M. White property to Mark Delesdernier."

> defendant, if no transfer exists from George W. to the children, Mark, George O. and Shirley, there can be no claim of the existence of a simulated transfer from George W. to his children. The property went from Succession of White to the children."

Secondly, the Court found no merit in plaintiff's contention that the "doctrine of the law of the case" compelled it to overrule the Exception of No Cause of Action. It stated that in its earlier opinion[11] it was not referring to the sales at issue herein but to others, and held:

> "Indeed, in view of the Eberle and Hogh cases cited above, a sale from the father to the children might very well state a cause of action in simulation. The three acts of sale before us, however, though listed in the previous opinion, are sales from the White succession to the children and are not sales by George W. to Mark, George O. and Shirley. Accordingly, the doctrine of the law of the case does not obligate us to overrule the exception of no cause of action with regard to the sales of property from the White succession."

Finally, the Court of Appeal held adversely to plaintiff's contention that the Trial Judge had committed error in maintaining the plea of one year's prescription (tort statute of limitations) to plaintiff's claim for One Million Dollars in damages resulting from alleged simulated sales, fraudulent transfers and invalid succession proceedings.

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11. Succession of Delesdernier, La.App., 184 So.2d. 37 (1966).

The Court had considered this in 1966 in its earlier opinion, supra, and by dicta concluded that prescription had tolled insofar as this claim for tort damages is concerned.

In referring to its prior decision, the Court held:

> "Though the court pointed out, supra at page 54, that plaintiff had negated prescription by alleging in her petition filed in 1958 that 'during the last four months (she had) learned' of the fraudulent occurrences the court factually found that in a suit filed in 1951 plaintiff had made the same allegations which serve as the basis for her claim in tort filed in 1958. Under the circumstances, we adopt the conclusion of this court stated supra at page 54:
>
> '* * * Clearly prescription had long since run against a claim for damages on account of the fraud therein alleged.'
>
> "Accordingly, we conclude the trial judge properly determined that the prescription of one-year (LSA-C.C. art 3536) was applicable."

CONCLUSION

This case has been properly noticed and heard below. It presents only questions of Louisiana law, which have been decided by the District Court and Appellate Courts of Louisiana in accordance with well established law.

Respectfully submitted,

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CERTIFICATE

I hereby certify that three copies of the foregoing Reply Brief on behalf of Mark Delesdernier, Respondent, have been forward to E. Howard McCaleb, III, First National Bank of Commerce Building, New Orleans, Louisiana 70112; King F. Nungesser, Jr., 7952 Chef Menteur Highesy, New Orleans, Louisiana 70126; Thomas J. Toranto, Jr., 316 Southern Aviation & Marine Building, 610 Poydras Street, New Orleans, Louisiana 70130 and Charles D. Lancaster, Jr., 200 First Metropolitan Bank Building, 2201 Veterans Memorial Boulevard, Metairie, Louisiana 70002, by depositing same in the United States mail, postage pre-paid, addressed to their offices, on this 17th day of April, 1978.

ERNEST A. CARRERE, JR.